No. 86-176

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

NICK KAKAVAS,

Petitioner,

vs.

FLOTA OCEANICA BRASILEIRA, S.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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46 pp

Question Presented for Review.

In an action for personal injuries in negligence under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905, does a stevedore or an independent repair service have the "primary responsibility" for the safety of its employees aboard ship *vis-a-vis* non-obvious hazards produced by equipment in the exclusive and active control of the ship's crew?

List of Parties Affected.

The parties affected by this case are listed on the caption.

Table of Contents.

	Page
Table of Cases and Other Authorities	iii
Question Presented for Review	i
List of Parties Affected	i
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Statement of the Case	3
REASONS FOR GRANTING THE WRIT:	
I. In holding that the "primary responsibility" charge should have been given below, the Second Circuit clearly misread the *Scindia* decision since such a charge is not applicable where, as here, the petitioner's injury resulted from a non-obvious hazard produced by equipment in the exclusive and active control of the ship's crew	7
II. The Second Circuit decision raises issues of national significance concerning the shipowner's duty to longshoremen under the Longshoremen's and Harbor Workers' Compensation Act	11
Conclusion	12

TABLE OF CASES AND OTHER AUTHORITIES.

Page

CASES:

Cook v. Exxon Shipping Co., 762 F.2d 750 (9th Cir.), *opinion amended,* 773 F.2d 1001 (9th Cir. 1985), *cert. denied,* 106 S. Ct. 1266 (1986) 7

Crumady v. The J.H. Fisser, 358 U.S. 423 (1959)... 10

Futo v. Lykes Bros. Steamship Co., Inc., 742 F.2d 209 (5th Cir. 1984)..... 11

Helaire v. Mobil Oil Co., 709 F.2d 1031 (5th Cir. 1983)..... 11

Hill v. Texaco, 674 F.2d 447 (5th Cir. 1982)..... 7

Marine Terminals v. Burnside Shipping Co., 394 U.S. 404 (1969)..... 8

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956)..... 8

Scindia Steam Navigation Co., Ltd. v. De los Santos, 451 U.S. 156 (1981).....*passim*

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946)... 8

Taliercio v. Compania Empressa Lineas Argentinas, 761 F.2d 126 (2d Cir. 1985)..... 9

Theriot v. Bay Drilling Corp., 783 F.2d 527 (5th Cir. 1986) 9

STATUTES:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 3

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) 2

Index to Appendix.

Appendix A—Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing (May 13, 1986) 1a

Appendix B—Opinion and judgment of the United States Court of Appeals for the Second Circuit (April 23, 1986) 1b

Appendix C—Order of the Honorable Morris E. Lasker, United States District Court, Southern District of New York, denying respondent's post-trial motions (September 11, 1985) and judgment of the United States District Court, Southern District of New York (July 3, 1985) 1c

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

NICK KAKAVAS,

Petitioner,

against

FLOTA OCEANICA BRASILEIRA, S.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit in the above captioned case.

Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit, officially reported at 789 F.2d 112 (2d Cir. 1986), appears in Appendix "B" herein. That decision reversed and remanded for a new trial on liability and damages a judgment of the United States District Court for the Southern District of New York (Hon. Morris E. Lasker), filed July 3, 1985, which, after a jury trial, was in favor of petitioner in the sum of $2,000,000. The judgment of the District Court and an order denying respondent's post-trial motions appears in Appendix "C" herein.

Jurisdiction.

The opinion and judgment of the United States Court of Appeals for the Second Circuit was filed on April 23, 1986. Petitioner thereafter petitioned for rehearing. It was denied on May 13, 1986. A copy of the denial of rehearing appears in Appendix "A" herein. This petition is filed within ninety days of the denial of rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Statute Involved.

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b), provides in pertinent part:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for

such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

Statement of the Case.

Stevens Technical Services ("Stevens") is an independent ship repair company that had been engaged for some seven weeks as general contractor to perform various work on respondent's cargo ship, the Frotasul. This work included repair of the hatch covers. Petitioner, Nick Kakavas, was employed by Stevens as repairman's helper.

This action to recover damages for personal injuries in negligence under §905(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §901 *et seq.*, arises as a result of an accident in which petitioner sustained a crippling injury while assisting a fellow employee burn away a piece of the "sliding rail" of a stuck hatch cover on respondent's ship. The accident occurred within hours of the scheduled departure time of the Frotasul from Port Houston, Texas, on November 2, 1979. In anticipation of leaving port at midnight on that date, the respondent's port engineer ordered the ship's crew to test the ship's six hatch covers for watertightness. The testing was accomplished by the crew opening and closing the hatches. While one of the hatch covers was being thus opened, a push/pull rod—a part of the hatch cover closing mechanism—got jammed

against the inside edge of the hatch cover "sliding rail" causing a hatch cover section—or "pontoon" as it was referred to in the litigation—to become stuck. At the time the hatch cover got stuck, the cover remained in a partially open position.

Upon being informed that the hatch cover had become stuck, the respondent's port engineer surveyed the scene. He decided that Stevens personnel would free the stuck hatch cover by burning away a six inch piece of the hatch cover sliding rail on each side of the cover.[1] The port engineer then left the stuck hatch cover and was not present while the repair work was subsequently carried out on the sliding rail. The time was about 9:30 p.m. The ship was dark.

Petitioner did not perform the actual burning on the sliding rail but rather stood holding a light for a co-employee, an electrowelder, while the latter did the actual burning. Both men stood on top of the hatch cover, the welder kneeling, petitioner standing next to him. The work began with the sliding rail on the port side of the cover. It was burned without mishap. However, as soon as the sliding rail on the starboard side was burned, the hatch cover jerked forward violently. This caused petitioner to fall over the edge of the hatch cover closing mechanism, his leg becoming wedged for some twenty minutes against that part of sliding rail that had become molten hot from the blow torch. Consequently, a large chunk of plaintiff's leg was quite literally burned away, the leg charring clear to the bone. As noted by the Second Circuit, the leg had been "rendered virtually useless." Appendix "B" at 7b.

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[1]There was a conflict in the record as to whether this decision was made by the respondent's port engineer alone or in conjunction with Kakavas.

The petitioner believed that the accident had occurred because the ship's crew had left tension on the winch cable which opened and closed the hatch cover. Petitioner's theory below was specifically that the cable was taut because the ship's crew—who alone had applied the tension in order to open the hatch cover and who alone could release it—had left the hatch after the cover had jammed without releasing the tension on the winch and that the respondent's port engineer or the ship's crew knew or should have known that leaving tension on the winch cable created a non-obvious and unavoidable hazard. Appendix "B" at 7b. In short, petitioner's theory below was that petitioner's injury resulted from a non-obvious hazard produced by equipment under active and exclusive control of the ship.

In an effort to establish this theory at trial, petitioner called a hatch cover expert. He testified that the accident did indeed occur due to tension on the winch cable which caused the hatch cover to lurch the instant that the burning of the sliding rail on the starboard side had freed the jammed push/pull rod. He further testified that, had there been no tension on the winch cable, it would have been perfectly safe for the men to have worked on top of the hatch cover. Petitioner further adduced testimony—without dispute—that the ship's crew and only the ship's crew could and did control the winch cable controls to set or release the tension.

Respondent's only witness, the port engineer, testified as a fact witness, not an expert. He testified that he did not know whether the crew had released the tension on the winch cable before the Stevens' personnel began to work on the hatch cover. Neither he nor any other crew member warned the Stevens personnel about checking the cable

tension before the work began despite the fact that he knew it might be dangerous. Respondent adduced absolutely no evidence that petitioner knew or should have known that tension remained on the winch cable. The ship was dark at the time; the winch controls were unseen many feet from where petitioner was working.

The District Court charged the jury, *inter alia,* that the shipowner had a continuing duty to use ordinary care "to furnish a person working aboard the ship with reasonably safe equipment and a reasonably safe place to work on the ship" and that the shipowner was "under no duty to warn a repair company or its employees of any conditions which are open or obvious or known to them, or of conditions which can be observed by the repair people in the exercise of reasonable care . . . unless the shipowner could reasonably anticipate that the repairmen would be unable to avoid such condition." The charge, as it pertains to the shipowner's duty, is set forth in full at footnote 3 of the Second Circuit opinion, Appendix "B" at 9b-10b.

The jury returned with a verdict in favor of the petitioner in the sum of $2,000,000. Respondent's post-trial motions were thereafter denied. Appendix "C" at 1c-2c.

Respondent appealed the judgment to the United States Court of Appeals for the Second Circuit. That Court unanimously reversed and remanded for a new trial on liability and damages. In the Second Circuit's view, the

" 'basic thrust' " of this Court's decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981) "was to place 'the primary burden on the stevedore for avoiding injuries caused by obvious hazards.' " Appendix "B" at 16b, *citing* Justice Powell's concurring opinion, *id.* at 180. Thus, according to the Second Circuit, the District Court's failure to charge "primary responsibility" constituted reversible error.

Petitioner now seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT.

I.

In holding that the "primary responsibility" charge should have been given below, the Second Circuit clearly misread the *Scindia* decision since such charge is not applicable where, as here, the petitioner's injury resulted from a non-obvious hazard produced by equipment in the exclusive and active control of the ship's crew.

As this Court discussed in *Scindia Steam Navigation Co., Ltd. v. De los Santos,* 451 U.S. 156 (1981), a longshoreman or ship repairman,[2] prior to the 1972 Amendments to the LHWCA, was able to recover against the shipowner for injury due to "unseaworthiness" of the vessel or its equipment. This essentially amounted to a "no fault" cause of action, affording the longshoreman

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[2]The protections afforded to longshoremen by the LHWCA have been held to apply to employees of independent ship repair companies who are working on the vessel. See, *Cook v. Exxon Shipping Co.,* 762 F.2d 750, 752 (9th Cir.), *opinion amended,* 773 F.2d 1001 (9th Cir. 1985), *cert. denied,* 106 S.Ct. 1266 (1986); *Hill v. Texaco, Inc.,* 674 F.2d 447, 451 (5th Cir. 1982).

relief against the shipowner even where the accident had been caused entirely by the negligence of the stevedore or his employees. See, *Scindia* at 164, *citing Seas Shipping Co. v. Sieracki,* 328 U.S. 85 (1946). The shipowner, in turn, could seek indemnity against the stevedore for breach of its warranty of workman-like service. See, *Scindia* at 165, *citing Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

Equally clear, however, the longshoremen could also recover against the shipowner, even prior to 1972, for injuries resulting from the *shipowner's* own negligence. Two grounds were recognized:

(1) injuries resulting from the shipowner's "exposing longshoremen to harm from hazards they may encounter in areas, or from equipment under the active control of the vessel during the stevedoring operation," and

(2) injuries resulting from the shipowner's failure to warn the stevedore "of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it, in exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work." *Scindia* at 166-167, *citing, Marine Terminals v. Burnside Shipping Co.,* 394 U.S. 404 (1969).

The 1972 Amendments to the LHWCA abolished the no fault cause of action along with the shipowner's third party action for indemnification against the stevedore. In its place, a statutory requirement was enacted that the longshoreman's right to recover against the shipowner

depended upon a showing of negligence on the part of the ship or its crew, i.e., actual fault. *Scindia* at 165.

The 1972 Amendments, however, had no effect on the two grounds set forth in *Marine Terminals*—injuries produced by equipment under the actual control of the ship or from the failure to warn of hazards known to the ship but not obvious to the longshoreman. This necessarily followed since such grounds were already based upon the actual negligence of the shipowner. Thus, even after the 1972 Amendments, the LHWCA continued to afford the longshoreman a remedy for injuries produced under those circumstances. See, e.g., *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986) (employee of oil drilling barge service company could recover against vessel owner for injury where area that he was injured was under control of vessel); *Taliercio v. Compania Empressa Lineas Argentinas,* 761 F.2d 126 (2d Cir. 1985) (longshoreman could recover against vessel owner for injury produced by defective sliding door which shipowner controlled and maintained).

Rather, as *Scindia* makes clear, the 1972 Amendments sought to relieve the shipowner of automatic liability for injuries resulting from open and obvious dangers known by the stevedore but which are neither known to nor under the exclusive and active control of the shipowner. *Scindia* at 167, 172-173, 175. It is here that the concept of the stevedore's "primary responsibility" for the safety of the longshoremen came into play: *Scindia* instructs that the "primary responsibility" for the safety of the longshoreman *vis-a-vis* open and obvious conditions known to and within the control of the stevedore rests with the stevedore. *Scindia* at 171-172. *Scindia* does not, however,

make the stevedore primarily responsible for the safety of his longshoremen irrespective of the nature and origin of danger.

Once these principles are articulated, one conclusion emerges: the Second Circuit seriously erred herein in mandating that a "primary responsibility" charge should have been given at trial below since the petitioner's injury here resulted from a non-obvious hazard produced by equipment in the exclusive and active control of the ship's crew. As petitioner's expert evidence at trial established, there was nothing intrinsically dangerous about freeing a stuck hatch cover while standing on top of it. It only became dangerous because the *ship's crew*—who alone controlled it—failed to release the tension on the hatch cover winch cable before the repair work began. That the dangerous condition resulting thereby is attributable to the ship is made clear by *Crumady v. The J.H. Fisser,* 358 U.S. 423 (1959), a case discussed in *Scindia* at 173. The longshoreman in *Crumady* was injured by a ship's winch when it was set by the ship's crew to shut off the current at twice the safe working load of the unloading gear. *Crumady* at 425-426. Addressing the nature of the dangerous condition, this Court stated:

> ". . . these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch—an appurtenance of the vessel—was not inherently defective as was the rope in [*Mahnich v. Southern S.S. Co.,* 321 U.S. 96 (1944)]. *But it was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work-at-hand."* *Crumady* at 427 (emphasis added)

As in *Crumady,* petitioner here did nothing more than bring into play a dangerous condition brought about by the ship's crew. The setting of tension on the winch controls by the ship's crew made standing on the hatch cover "unsafe and dangerous"—not the repair of the hatch cover itself.

So, too, no proof was adduced at trial establishing that petitioner knew or should have known that a dangerous condition existed by virtue of tension on the winch. The accident occurred on a darkened ship at 10 p.m. Moreover, the winch controls were unseen, many feet from where petitioner and his co-worker stood. As far as petitioner was concerned, the hazard was non-obvious.

The Second Circuit decision is consequently founded upon a serious error of law and should be remedied by this Court.

II.

The Second Circuit decision raises issues of national significance concerning the shipowner's duty to longshoremen under the Longshoremen's and Harbor Workers' Compensation Act.

In granting certiorari in *Scindia,* this Court believed it would provide dispositive guidelines as to the meaning of §905(b). It appears, however, that this effort has not been entirely successful. The Fifth Court in *Futo v. Lykes Bros. Steamship Co., Inc.,* 742 F.2d 209, 214 (5th Cir. 1984), has stated that "the impact of *Scindia* on the extent of a vessel's duty under section 905(b) 'as previously applied in this Circuit . . . remains less than clear,' " citing *Helaire v. Mobil Oil Co.,* 709 F.2d 1031, 1036 (5th Cir. 1983). Similarly, the Second Circuit in its opinion here has stated that the *Scindia* decision was "less clear" as to

"shipowner's duties when he learns that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore and which may cause injury to the longshoreman." Appendix "B" at 15b.

Petitioner respectfully submits that the Second Circuit opinion here can only magnify the problem. The logical extension of this decision is to require that the "primary responsibility" charge be given in all 905(b) lawsuits irrespective of the nature and origin of the dangerous condition. As previously pointed out, such an across-the-board charge would be contrary to *Scindia*. Perhaps even more importantly, such a charge would serve only to heighten the jury's confusion as to the proper allocation of responsibility for the safety of longshoremen since it would require the stevedore to be primarily responsible for safety conditions completely beyond his knowledge or control. Common sense dictates that cannot be the correct rule of law. For this reason, too, it should be reviewed by this Court.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Dated: August 4, 1986

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APPENDIX A—Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing (May 13, 1986).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of May one thousand nine hundred and eighty-six.

Present:

Hon. Wilfred Feinberg, Chief Judge.
Hon. Ralph K. Winter, Circuit Judge.

NICK KAKAVAS,

Plaintiff-Appellee,

v.

FLOTA OCEANICA BRASILEIRA, S.A.,

Defendant-Appellant.

Docket No. 85-7802

A Petition for a rehearing having been filed herein by Plaintiff-Appellee, Nick Kakavas.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

ELAINE B. GOLDSMITH
Clerk

APPENDIX B—Opinion and Judgment of the United States Court of Appeals for the Second Circuit (April 23, 1986).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 678—August Term, 1985

(Argued January 6, 1986 Decided April 23, 1986)

Docket No. 85-7802

NICK KAKAVAS,

Plaintiff-Appellee,

—v.—

FLOTA OCEANICA BRASILEIRA, S.A.,

Defendant-Appellant.

Before:

FEINBERG, *Chief Judge,*
FRIENDLY* and WINTER, *Circuit Judges.*

Appeal by defendant shipowner from a judgment of the District Court for the Southern District of New York,

* This opinion is substantially in the form written by Judge Friendly before his death on March 11, 1986.

Morris E. Lasker, *Judge*, entered on a jury verdict finding defendant 100% liable under § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, for personal injuries sustained by plaintiff, an employee of a ship repair company, while engaged in freeing a stuck hatch cover aboard defendant's vessel, and awarding total damages in the amount of $2,000,000. Reversed for a new trial.

VICTOR S. CICHANOWICZ, New York, New York (Cichanowicz, Callan, & Keane, New York, New York), *for Defendant-Appellant*.

THOMAS STICKEL, New York, New York (Lipsig, Sullivan, Liapakis, P.C., New York, New York), *for Plaintiff-Appellee*.

FRIENDLY, *Circuit Judge*:

This appeal from a judgment entered on a jury verdict in the District Court for the Southern District of New York, Morris E. Lasker, *Judge*, requires us to apply the principles enunciated by the Supreme Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), to the question of the extent of a shipowner's duty to anticipate and warn of or take steps to prevent a hazardous condition that develops during the course of repair work carried out on board ship by employees of an independent contractor. The jury found defendant Flota

Oceanica Brasileira, S.A. ("Flota"), owner of the merchant vessel Frotasul, 100% liable under § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*, for personal injuries sustained by plaintiff Nick Kakavas in the course of his performing repair work on board the Frotasul and awarded him compensatory damages in the amount of $2,000,000. Flota's principal contention on appeal is that the district judge erred in charging the jury that Flota had a continuing duty to furnish and maintain a reasonably safe place of work rather than, as Flota had requested, that the primary responsibility for Kakavas' safety rested with his employer, an independent ship repair contractor, and that Flota was entitled to rely on the employer to take the precautions necessary to avoid exposing Kakavas to hazards that might develop in the course of the repair work. Because we agree with Flota that the judge's instructions to the jury did not adequately express the nature and extent of a shipowner's duty in these circumstances and that Flota's counsel sufficiently, albeit clumsily, brought this point to the judge's attention, we reverse and remand for a new trial.

The jury could fairly have found the facts to be as follows: The accident occurred while the Frotasul was docked at Port Houston, Texas. Kakavas was employed at the time as a repairman's helper by Stevens Technical Services ("Stevens"), an independent ship repair company that had been engaged for some seven weeks as general contractor in charge of various repairs on the Frotasul. Chief among Stevens' tasks had been the repair of the vessel's hatches and hatch covers, the latter of which had involved removing the covers, taking them ashore and replacing all the steel that needed to be replaced, and

returning them to the ship and reassembling them, as well as removing, greasing, and reassembling the hatch cover wheels.

The hatch where the accident occurred, Hatch No. 4, was equipped with a MacGregor hatch cover; a brief explanation of its construction and operation will be helpful. The cover consists of six steel sections (or "pontoons"), each of which weighs approximately six tons and measures seven feet long from forward to aft and 37-1/2 feet wide from starboard to port. The distance from the deck to the top of the hatch cover is five feet. The pontoons are connected by "pull/push rods," one on the starboard and one on the port side of each pontoon. A steel cable runs over the center of the hatch from a winch positioned on the deck at the forward end, through a pulley at the aft end, and back again to attach to a shackle at the forward edge of the first pontoon. Tension on the cable pulls the cover aft and opens the hatch; if the cable is unthreaded from the pulley and stretched directly between the winch and the shackle, tension on the cable pulls the cover in the opposite direction (forward) and closes the hatch.

As the hatch is being opened, the pontoons fold accordion-style on their sides into a well at the aft-end of the hatch. This is accomplished by a dual system of guide rails and wheels. On the starboard and port sides of each pontoon are two wheels—a "rolling wheel" and a "tipping wheel." The rolling wheel is larger and is located at the bottom aft corner of the pontoon. It rests on the "sliding rail" or "runway," a steel track running along the top of the port and starboard hatch walls. The sliding rail slopes downward to the deck just past the aft end of the hatch; thus, when each pontoon reachs that point, its

rolling wheel runs off into the air. This causes the weight of the pontoon to shift to the tilting wheel, which is located near the upper edge of the pontoon and at its center of gravity. The tilting wheel rests on the "guide rail," which begins just short of the aft end of the hatch and is higher and narrower than the sliding rail. As the pontoon continues its motion aft, now resting on the guide rail, its aft end tips downward and its forward end upward and it folds against the other pontoons in the well.

The Frotasul was set to sail at midnight on November 2, 1979. At about 6:00 p.m. the port engineer,[1] Carlos Aguas, ordered all the hatches tested for watertightness. This involved opening each hatch, chalking the rubber gaskets around the cover, closing the hatch and tightening down the cover by means of cleats and wedges, spraying the cover with water, and then reopening it to see whether any chalk had been washed away. The ship's crew operated the winch to open and close the covers, applied chalk to the gaskets, and sprayed water on the covers; employees of Stevens reassembled the pontoons and tightened and untightened the cleats.

The crew reached Hatch No. 4 at about 9:30 p.m., started the winch motor, and began opening the hatch cover for testing. After only one or two pontoons had folded into the well, the cover ground to a halt: the push/pull rods on each side of the pontoon next in line to fold into the well had jammed against the inside edge of the sliding rail, preventing the cover from opening any

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1 The port engineer is the representative of the shipowner and supervises repair of the vessel in port. Aguas was employed by Omnium Agency, a private company that was a general agent for Flota in this case.

further. Port engineer Aguas was called to the scene and, after surveying the situation, concluded that the sliding rail, which Stevens had manufactured and installed, was too wide at the point where the push/pull rods had jammed. The decision was made to free the cover by burning away on each side of the hatch a six-inch piece of the sliding rail.[2] Apart from a consensus that the Stevens employees would perform the burning operation, there is no evidence that anyone present discussed the method by which the repairs would be carried out. Aguas left at once, and neither he nor any member of the crew was at the hatch when the repairs got underway or while they were being performed.

The work began on the port side. A Stevens welder using a portable acetylene torch knelt on top of the pontoon directly forward of the stuck pontoon, which had come to rest in a tilted position, and leaned over the edge to cut the sliding rail. Kakavas stood beside him holding a light. After freeing the port side, the two men moved to the starboard side and repeated the process. As soon as the starboard side was freed, the hatch cover began to move. Although the testimony of Kakavas and other witnesses was in conflict as to just how far the cover moved, the evidence adduced at trial was more than sufficient for the jury to credit Kakavas' version of what happened next: the pontoon on which he and the welder were standing jerked aft, causing him to lurch forward

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2 Aguas testified that Kakavas was the acting foreman of the Stevens gang when the hatch cover jammed and that he and Kakavas discussed the problem and together decided to repair it by burning away part of the sliding rail. However, Kakavas denied that he was the acting foreman or that he had discussed the repairs with Aguas. The record shows that Kakavas speaks only Greek and Aguas speaks only English and Portugese.

and to the side and his right leg to slip down over the edge of the pontoon onto the hot metal of the freshly cut sliding rail, where it was wedged in place by the rolling wheel of the next pontoon. Kakavas' cries and the commotion on deck brought Aguas and the crew running, but they could not move the hatch cover without first rerigging the winch cable to pull the cover forward. As soon as this was done, Kakavas' leg was freed and he was taken to a hospital. Medical testimony established that his right leg had been rendered virtually useless by the accident, that he would suffer continual pain, and that he was permanently disabled from physical work. Medical expenses amounted to $40,000, and lost wages prior to trial and for the 17 years of Kakavas' future work life amounted to approximately $525,000. No effort was made at trial by Kakavas to quantify damages for pain and suffering or by Flota to adjust for income tax or to discount to present value.

Kakavas' theory at trial and on this appeal is that the accident occurred because tension on the winch cable caused the hatch cover to move as soon as the stuck pontoon was freed; that the cable was taut because the ship's crew had left the hatch after the cover had jammed without releasing the winch; that Aguas and the crew knew or should have known that leaving tension on the cable created a non-obvious hazard that would be unavoidable by the Stevens employees repairing the hatch cover; and that Flota, through the failure of Aguas and the crew to take steps to correct this hazard, is liable in negligence for Kakavas' injuries.

Kakavas called an expert, Immo Nordstrom, an "independent ship surveyor" with experience in designing and repairing hatch covers, who testified that in his opinion it

was not good and safe practice for Aguas to have left the hatch area while the repair work was going on because "he's the one who really knows how the winch operates." Nordstrom also testified that there were three possible places where the men could have stood to perform the repairs: on top of the pontoon, as they did; on the deck next to the pontoon, leaning over the guide rail; and on a wooden staging built up from the deck next to the hatch and extending over the guide rail. As to the first, Nordstrom said that it would have been safe to work from on top of the pontoon only if the hatch cover had been completely closed—in other words, only if all tension had been removed from the winch cable. As to the second, he said that the men would have been no better off standing on the deck, since in that position the sudden movement of the hatch cover would have severed their arms. He concluded that the third method—working from a staging—would have been the safest course for the men to follow under the circumstances. He testified that stagings are often built to perform such repairs, that ship repairmen are quite familiar with them, and that it would have taken at least one hour to build one here.

At the close of Kakavas' case, Flota moved for a directed verdict. Flota's theory below and on this appeal is that, even if the hatch cover moved due to tension on the winch cable and even if that tension existed because the crew had failed to release the winch, a taut winch cable on a stuck hatch cover is not in and of itself a hazardous condition, but became so here only when Kakavas and the welder chose to stand on top of the cover; that their decision to free the cover from that position was unilateral and neither was nor could have been anticipated by Aguas and the crew; that Flota was

under no duty to supervise the repairs and was entitled to rely on Kakavas' employer choosing a method for carrying them out that would best protect Kakavas and his fellow workers; and that Kakavas' injuries were the result of his own and his employer's negligence in failing to check on the condition of the winch cable before initiating repairs from on top of the hatch cover.

The district judge denied Flota's motion for a directed verdict. Flota's only witness was Aguas, who not only did not testify as an expert but said that he had never seen a stuck hatch cover prior to the incident in question. He testified that no one from Stevens had inquired as to the winch cable or had asked him to operate the winch, despite the fact that he and the crew had been available to do so at any time before and during the repairs. He also testified that he had not discussed with Kakavas how the repairs would be carried out and had not known that Kakavas would decide to work from on top of the hatch cover.

The judge, after explaining each party's theory of the case, instructed the jury on the law of negligence, contributory negligence, and damages as it related to the facts in evidence. We set forth in the margin the judge's charge regarding the duty owed by a shipowner to the employees of an independent contractor working on board his vessel.[3] The jury found, in answer to questions put by the

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[3] Now, the law is that it is the continuing duty of a shipowner to use ordinary care under the circumstances to furnish a person working aboard the ship with reasonably safe equipment and a reasonably safe place to work on the ship, and to use ordinary care under the circumstances to maintain and keep the place at [sic] work and the ship's equipment used in carrying on the work, in a reasonably safe condition.

(footnote continued on following page)

court, that Flota was negligent, that its negligence was a proximate cause of Kakavas' injuries, that damages were $2,000,000, and that Flota had not established that Kakavas was negligent and that his negligence was a proximate cause of the injury. Flota moved for judgment notwithstanding the verdict or, in the alternative, for an order setting aside the verdict and for a new trial under Fed. R. Civ. P. 50(b) and 59. The motion was denied on September 11, 1985. Flota appeals from the judgment and from the order denying its motions.

DISCUSSION

As is well known, *see Scindia*, 451 U.S. at 164-66, decisions prior to the 1972 Amendments to the LHWCA had produced an anomalous and intolerable situation with respect to actions by longshoremen and harbor

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This continuing duty to use ordinary care under the circumstances, owed by the shipowner to a person working aboard the ship, exists independently of and separate from any similar duty owed to the repairman by anybody else.

Now, although this is so, although the shipowner has such a duty, the mere fact that an accident has occurred does not mean that the shipowner is responsible for the accident or liable for the injury. Moreover, a shipowner is not an insurer of the safety of a repairman.

That means he is not legally called upon to guarantee 100 percent the safety of a repairman as the issuer of an insurance policy might be, and is under no duty to warn a repair company or its employees of any conditions which are open or obvious or known to them, or of conditions which can be observed by the repair people in the exercise of reasonable care.

The shipowner is not responsible to do that unless, however, the shipowner could reasonably anticipate that the repairman would be unable to avoid such a condition.

In other words, the law doesn't require a shipowner to warn somebody of something which they are bound to see themselves and which they can avoid.

workers against shipowners.[4] Under the doctrine of unseaworthiness an injured longshoreman could succeed in an action against the shipowner for almost any accident, even one occasioned by defective equipment supplied by the stevedore or faulty use of equipment by the stevedore's employees. A large portion of the award would go in payment of the fees of the plaintiff's attorney. A considerable portion—perhaps all—of the balance would go to the stevedore's insurer, to the extent of workmen's compensation payments to the plaintiff. When the stevedore had been negligent, the shipowner would generally be able to recover the amount of the award for the stevedore's breach of his express or implied warranty.

This scheme worked a series of frustrations. The plaintiff was generally remitted to the inadequate compensation payments under the LHWCA. The stevedore's insurer, who had collected premiums in the expectation of paying compensation, ended up paying nothing.[5] The stevedore, whose liability was to have been limited by § 905(a) to the workmen's compensation payments to the injured employee, paid the larger amounts awarded against the ship.

The 1972 Amendments, as Justice White succintly put it in *Scindia*, 451 U.S. at 165, "changed this scheme of things"—but only somewhat. Workmen's compensation benefits were increased. The longshoreman's action against the shipowner for unseaworthiness was abolished;

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4 We shall often use the term "longshoreman" to include all harbor workers and the term "stevedore" to include all employers of harbor workers.

5 At least this would have been true at the outset. In theory, recoveries by compensation insurers would in the long run work their way into premium reductions.

so was the shipowner's third party action against the stevedore. However, the longshoreman's action against the shipowner for negligence was preserved, with the House committee report stating that the purpose for this was to place the injured longshoreman "in the same position he would be if he were injured in non-maritime employment ashore . . . and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'non-delegable duty,' or the like." H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4703. The House committee also stated that the definition of the vessel's negligence was left to be "resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties." *Id.*, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4704. Over time, more and more courts came to adopt §§ 343 and 343A(1) of the Restatement of Torts as the standard for shipowner negligence:

> § 343. *Dangerous Conditions Known to or Discoverable by Possessor*
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. *Known or Obvious Dangers*

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

See Scindia, 451 U.S. at 180 n.1 (Powell, J., concurring, joined by Rehnquist, J.); *Evans v. Transportacion Maritime Mexicana*, 639 F.2d 848, 852-53 (2d Cir. 1981). Less appropriately, some courts resurrected the notion that the owner had a "non-delegable duty" to furnish a safe place to work, despite congressional disapproval of this judicial nomenclature.

Scindia afforded the Supreme Court an opportunity to clarify the extent to which a shipowner's duty of care to warn of or eliminate a dangerous condition on board ship is qualified by his reasonable reliance on the expertise of the stevedore. The case involved injuries to a longshoreman employed by a stevedore to load cargo on the defendant's vessel: While working in the hold, the longshoreman was struck by cargo that fell from a pallet being held in suspension by a winch that was part of the ship's gear but was being operated by another longshoreman. The winch was allegedly defective and this was allegedly known by or obvious to both the stevedore and the shipowner for two days prior to the accident.

The basic theme of the *Scindia* opinion is the extensive reliance that a shipowner may justifiably place on an independent contractor. The ship's duty is "to have the

ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety." 451 U.S. at 167.

After analyzing the background of the 1972 Amendments and the positions of the parties, the Court rejected the view of the Court of Appeals for the Ninth Circuit that the vessel owed a duty to the longshoreman requiring it "to inspect or supervise the stevedoring operation." *Id.* at 168.

> We are of the view that absent contract provision, positive law, or custom to the contrary—none of which has been cited to us in this case—the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself.

Id. at 172.[6]

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[6] The Court explained:

> As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. Section 41 of the Act, 33 U.S.C. § 941, requires the stevedore, the longshoremen's employer, to provide a "reasonably safe" place to work and to take such safeguards with respect to equipment and working conditions as the Secretary of Labor may determine to be necessary to avoid injury to longshoremen. The ship is not the common employer of the longshoremen and owes no such statutory duty to them. Furthermore, as our cases indicate, the stevedore normally warrants to discharge his duties in a workmanlike manner; and although the 1972 Amendments relieved the stevedore of his duty to indemnify the shipowner for damages paid to longshoremen for

Having placed the primary responsibility for safety during cargo operations squarely on the independent contractor, the Court turned to "the more difficult and recurring issue involved in this case: What are the shipowner's duties when he learns that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore and which may cause injury to the longshoreman?" *Id.* at 172-73. On this issue, the Court was less clear. It noted with disapproval the view of the Court of Appeals for the Ninth Circuit that "if the vessel should realize that the condition presents an unreasonable risk of harm, it is liable if it 'fails to exercise reasonable care under the circumstances' to protect the longshoreman." *Id.* at 174. It also noted the position of this court in *Evans*, 639 F.2d at 856, that, while mere knowledge of a dangerous condition would not suffice to fasten a duty to act on the shipowner, if the shipowner should anticipate that the stevedore will not or cannot correct the danger and that the longshoremen cannot avoid it, he is bound to take reasonable steps to obviate or neutralize the hazard. 451 U.S. at 174-75. The Court found itself unprepared to agree that a shipowner has precisely the duty described by us in *Evans*, though it did not foreclose the possibility that it might be so prepared at some future time. *See Lieggi v. Maritime Co. of the Philippines*, 667 F.2d 324, 328 n.9 (2d Cir. 1981). Rather than formulate a general rule, the Court held only that "there are circumstances in which the shipowner has a duty to act where the danger to

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injuries caused by the stevedore's breach of warranty, they did not otherwise disturb the contractual undertaking of the stevedore nor the rightful expectation of the vessel that the stevedore would perform his task properly without supervision by the ship.

451 U.S. at 170 (footnote omitted).

longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations." *Id.* at 175. On the facts before it, the Court concluded that—even though the decision whether to continue using the winch "was a matter of judgment committed to the stevedore in the first instance"—the longshoreman was entitled to a jury trial because a jury might conclude that the winch was so clearly unsafe and the stevedore's decision to continue using it so "obviously improvident" that the shipowner had a duty to intervene, stop the loading operation and repair the winch. *Id.* at 175-76, 178.[7]

Mere reading of the judge's charge in the present action, *see supra* note 3, suffices to disclose how far it departed from the standards laid down in *Scindia*. Whereas the "basic thrust" of *Scindia* was to place "the primary burden on the stevedore for avoiding injuries caused by obvious hazards," *id* at 108 (Powell, *J.*, concurring), the charge begins with an emphatic statement that just such a burden here rested on Flota. It suggested that the ship's equipment was unsafe whereas, unlike the

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[7] Our analysis of *Scindia* has been taken from Justice White's opinion for the Court. Justice Brennan's concurring opinion, in which Justices Marshall and Blackmun joined, seems to differ only in requiring actual knowledge of the dangerous condition by the shipowner. 451 U.S. at 179. Justice Powell, writing for himself and Justice Rehnquist, characterized the "basic thrust" of the Court's opinion as "placing the primary burden on the stevedore for avoiding injuries caused by obvious hazards." *Id.* at 180. He wrote separately only to emphasize the distinction between the Court's approach and the "reasonableness" standard of the Ninth Circuit:

> Only where the judgment of the stevedore is 'obviously improvident,' . . . and this poor judgment either is known to the shipowner or reasonably should be anticipated under the circumstances, does the shipowner have a duty to intervene.

Id. (footnote omitted).

ship's winch in *Scindia*, there was nothing unsafe about it. The ship's equipment had successfully performed its mission; what was unsafe was for Stevens to instruct its employees to stand on the hatch cover without first making sure that the winch cable was slack. The instruction was that the shipowner had a continuing duty to monitor the repair work; *Scindia* had stated the contrary. The instruction made "reasonable anticipation"—of something—the measure of the extent of the shipowner's duty to warn; *Scindia* had suggested that the test was "obviously improvident judgment" on the part of the stevedore. In short, whatever might be said of this charge in pre-*Scindia* and pre-*Evans* days—the judge himself referred to the charge as "antedated"—it did not properly put to the jury what the law now is.

The extent to which the charge diverged from *Scindia* is illustrated by the changes made in the relevant instruction in E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* (3d ed. 1977). The instruction recommended in the bound edition does not differ widely from that given here. *See id.* § 96.35. But in the most recent cumulative supplement, that instruction is withdrawn, with the explanation:

> The authors agree with experienced admiralty practitioners who have suggested that the text instruction is misleading, and very probably legally erroneous, in the light of the 1972 amendments to the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C.A. § 905(b).
>
> The notes to the text are also inadequate and misleading, in that most cited cases were decided before the statute was amended.

Id. at 1124 (Supp. 1985). Although a new instruction is not provided, the notes discuss *Scindia* and its progeny at length, stressing how they place the primary responsibility for safety during cargo operations on the stevedore and during repair operations on the independent contractor. An updated instruction, fully incorporating these principles, can be found in 4 L. Sand, J. Siffert, S. Reiss, J. Sexton & J. Thorpe, *Modern Federal Jury Instructions* ¶ 85.01, instructions 85-6 & 85-7 (1985). The contrast with the charge given in the present action is apparent.

The question remains whether Flota's counsel adequately objected. When counsel were asked for any comments on the charge, Flota's counsel said that he had no exceptions to the charge as given, but did have requests to charge. Counsel had already submitted sixteen requests to charge. Although, as so often is the case, each was unduly favorable to the proponent, and it consequently was not error to refuse to give any one of them as asked, they should together have sufficed to alert the judge that the charge was inadequate under *Scindia*. The judge asked whether counsel wished merely to repeat these earlier requests. Counsel answered, "I certainly do. Would it be sufficient to show each one or is it sufficient—"; the judge interrupted, "It is sufficient on the record [that] you requested charges on those matters. It is sufficient by filing them. Is there anything specific at this time you wish to call to my attention?" Counsel responded by mentioning his second request to charge, which dealt with the primary responsibility of Stevens for the safety of its employees, and by referring broadly to "the basic principles enunciated by *Scindia*" and "the change in the law and the amendment by § 905(b)." We have held that a request for further instructions is equivalent to an objec-

tion to the charge, *Wright v. Farm Journal, Inc.*, 158 F.2d 976, 978 (2d Cir. 1947). We conclude that Flota's requests to charge, when read in light of the earlier argument in support of Flota's motion for a directed verdict and the colloquy summarized above, were enough to alert the judge to the question whether his charge properly reflected the law as molded by *Scindia*.

The judgment is therefore reversed and the cause remanded for a new trial on liability and damages.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of April one thousand nine hundred and eighty-six.

Present:

Hon. Wilfred Feinberg, Chief Judge,
Hon. Henry J. Friendly*
Hon. Ralph K. Winter, Circuit Judges.

NICK KAKAVAS,

Plaintiff-Appellee,

v.

FLOTA OCEANICA BRASILEIRA, S.A.,

Defendant-Appellant.

Docket No. 85-7802

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*This opinion is substantially in the form written by Judge Friendly before his death on March 11, 1986.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is Reversed and the action be and it hereby is remanded to the said District court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
Clerk,
By: EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX C—Order of the Honorable Morris E. Lasker, United States District Court, Southern District of New York, Denying Respondent's Post-Trial Motions (September 11, 1985) and Judgment of the United States District Court, Southern District of New York (July 3, 1985).

ENDORSEMENT

NICK KAKAVAS,

Plaintiff,

v.

FLOTA OCEANICA BRASILEIRA, S.A.,

Defendant.

80 Civ. 3344 (MEL)

LASKER, D.J.

The defendant moves the court to set aside the verdict and to enter judgment in favor of the defendant. Although the motion does not indicate under what rule it is brought, we presume that the defendant is requesting judgment notwithstanding the verdict under Rule 50(b) of the Federal Rules of Civil Procedure. In the alternative, the defendant moved to set aside the verdict and for a new trial, a motion

we presume to be made under Rule 59 of the Federal Rules of Civil Procedure.

The motion is denied. A ". . . jury verdict is not lightly to be overturned." *Fleet Messenger Service v. Life Insurance Company of North America,* 315 F.2d 593, 598 (2d Cir. 1963), and in this case the evidence before the jury was clearly sufficient to justify a verdict that the defendant was negligent. To the extent that the motion is based on alleged deficiencies in the charge, it is denied both because the charge was sufficient on the subject in question and because no exception was taken by counsel to the language presently argued to be erroneous.

The verdict of Two Million although large, was not so excessive that the court should reduce it. The plaintiff Nick Kakavas suffered grievous and extensive burns to his leg which have left him crippled. Aside from his loss of compensation as a result of the accident, his injury was such as to cause excruciating pain and suffering and to require him to undergo a series of arduous surgical operations. Under such circumstances, the jury's verdict was not excessive.

The motion is denied.

It is so ordered.

Dated: New York, New York
September 11, 1985

MORRIS E. LASKER
U.S.D.J.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NICK KAKAVAS,

Plaintiff,

against

FLOTA OCEANICA BRASILEIRA, S.A.,

Defendant.

80 Civ 3344 (MEL)

This action came on for trial from June 3 to June 6, 1985 before the Court and a jury, the Honorable Morris E. Lasker, United States District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict, finding 100% liability on the defendant and finding total damages in the amount of $2,000,000.00 (TWO MILLION DOLLARS),

IT IS ORDERED and ADJUDGED that judgment be and is hereby entered in favor of the plaintiff Nick Kakavas and against defendant Flota Oceanica Brasileira, S.A. in the amount of $2,000,000.00 (TWO MILLION DOLLARS) plus interest from June 6, 1985, in accordance with the verdict on liability and direction of the Court.

Dated at New York, New York
this 3rd day of July, 1985.

MORRIS E. LASKER
U.S.D.J. P.C.

Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-176

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NICK KAKAVAS,

Petitioner,

—against—

FLOTA OCEANICA BRASILEIRA, S.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR S. CICHANOWICZ
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Rule 28.1 Statement

Respondent, Frota Oceanica Brasileira, S.A. (sued herein as Flota Oceanica Brasileira, S.A.), is a Brazilian Corporation which has no parent company, subsidiaries, except wholly owned subsidiaries, or affiliates within the meaning of Supreme Court Rule 28.1.

TABLE OF CONTENTS

PAGE

Rule 28.1 Statement i

Statement of the Case 1

Reasons for Denying the Petition 3

I The Second Circuit correctly interpreted the *Scindia* decision and applied it to the issues in the case ... 3

II The decision of the Second Circuit raises no issues of national significance 4

CONCLUSION 4

TABLE OF AUTHORITIES

Cases:

Futo v. *Lykes Bros. Steamship Co., Inc.*, 742 F.2d 209 (5th Cir. 1984) 4

Scindia Steam Navigation Co. v. *De Los Santos*, 451 U.S. 156 (1981) 3

Statutes and Rules:

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq:*

§905(b) 3

Other Authority:

Restatement of Torts (Second) §343A 4

IN THE

SUPREME COURT OF THE UNITED STATES

No. 86-176

NICK KAKAVAS,

Petitioner,

—against—

FLOTA OCEANICA BRASILEIRA, S.A.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement of the Case

This action concerns an accident which was sustained by an employee of an independent ship repair contractor while engaged in correcting defective repair work which his employer had performed at one of the hatches of respondent's vessel. Petitioner's employer was the general contractor in charge of repairs and had conducted various repairs aboard the vessel over a period of seven weeks. Chief among its tasks was the repair of the vessel's hatches and hatch covers.

At the time of the accident, petitioner was engaged with a fellow worker in freeing a hatch cover which had become stuck in a partially open position because the sliding rails which petitioner's employer had fabricated and installed at #4 hatch were too wide and prevented the covers from moving freely. The defective workmanship was discovered while the #4 hatch was being opened in order to be tested for watertightness, an operation which was being conducted jointly by the ship's crew and employees of the repair contractor.

Petitioner's employer had instructed petitioner and his co-employee to climb onto the hatch covers and free the stuck cover. The hatch covers were attached to each other by linkage arms and petitioner's accident occurred when petitioner's co-worker succeeded in freeing the stuck cover which, in turn, caused the hatch cover on which petitioner was standing to move and caused petitioner to lose his balance and fall.

The repair operation had been in progress for some time and the repair contractor was in complete control of the repair operation and the #4 hatch where the repair work was being conducted. Respondent shipowner had no knowledge as to the method which petitioner's employer would elect to free the stuck cover and no representatives of the shipowner were present when the repair work got under way or while it was being performed.

There was no reason for respondent to anticipate that repair of the stuck hatch cover would be performed from on top of the covers of the partially open hatch. According to petitioner's expert, the safest place from which to free the stuck hatch cover would have been a staging built on deck next to the hatch. Repair contractors are familiar with stagings and usually construct them when performing similar repair work.

There is no evidence in the record that such a staging could not have been constructed or that respondent in any way interfered with the repair contractor's ability to construct a staging or take other precautions for the safety of its employees.

The petitioner's contention that tension on the winch cable was a nonobvious hazard produced by equipment under the active and exclusive control of the ship's crew was nothing more than a theory which petitioner advanced in the Court below (Petition p. 5). It, therefore, does not present a valid basis for review by this Court on certiorari.

While it was petitioner's theory that the ship was dark and

testimony was offered in support thereof, there also was evidence that the ship's deck lights were on at the time. There was also evidence that employees of the repair contractor actively participated in the testing of the hatches and were present when "the cover ground to a halt". Accordingly, petitioner's employer was in a position to know of any tension which may have developed on the winch cable and, as the Court of Appeals has pointed out, should not have instructed its employees to stand on the hatch cover without first making sure that the cable was slack.

REASONS FOR DENYING THE PETITION

I

The Second Circuit correctly interpreted the *Scindia* decision and applied it to the issues in the case.

Normally the propriety of a charge is evaluated on the basis of all the evidence in the case and not just the theory and proof which one side elects to offer in support of its claim. The Second Circuit, therefore, committed no error when it held that, under the facts of this case, the trial court's charge (which admittedly "antedated" this Court's decision in "*Scindia*") did not properly state the applicable law to the jury.

In *Scindia Steam Navigation Co.* v. *De Los Santos,* 451 U.S. 156, 176 (1981) this Court explicitly held that under §905(b) it was imperative to instruct the jury on the duties placed on the stevedore and the vessel's justifiable expectations that those duties would be performed. Not only did the District Court fail to instruct the jury on the employer's legal responsibility but the error was compounded by the charge that the vessel owner had a continuing duty to supply a safe place to work. As the Second Circuit noted, "*Scindia* had stated the contrary". 789 F.2d at 119.

Merely because petitioner elects to characterize a hazard as nonobvious and attributes it to equipment purportedly in the

exclusive and active control of the ship's crew does not convert the decision of the Second Circuit into an error of law warranting review by this Court.

II

The decision of the Second Circuit raises no issues of national significance.

Petitioner asserts that somewhere there lurks in the decision of the Second Circuit an issue of national significance which requires review by this Court. Significantly, there is no showing of any matters of national significance requiring the Court's involvement. The statement in *Futo* v. *Lykes Bros. Steamship Co., Inc.*, 742 F.2d 209 (5th Cir. 1984) is merely a comment and relates to the impact on the earlier decisions by the Fifth Circuit applying the Restatement of Torts. The statement in the decision of the Second Circuit apparently is also nothing more than a comment. The Court encountered no problem in holding that obviously improvident conduct on the part of the stevedore was the measure of the shipowner's duty to warn. 789 F.2d at 119-120.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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